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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/537,752	12/05/2005	Michael Leister	2133.089USU	5178
27623 7590 07/14/2009 OHLANDT, GREELEY, RUGGIERO & PERLE, LLP ONE LANDMARK SQUARE, 10TH FLOOR STAMFORD, CT 06901				
EXAMINER HOFFMANN, JOHN M				
ART UNIT		PAPER NUMBER		
1791				
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07/14/2009		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

### Office Action Summary

**Application No.**

10/537,752

**Applicant(s)**

LEISTER ET AL.

**Examiner**

John Hoffmann

**Art Unit**

1791

**Period for Reply** -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 27 May 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-5, 8-22 and 28-37 is/are pending in the application.
- 4a) Of the above claim(s) 10, 12, 20 and 21 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5, 8-9, 11, 13-19, 22 and 28-37 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### ***'Claim Rejections - 35 USC § 103***

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 1-5, 11, 13-19, 22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kunert WO/01/53222 in view of Onozawa 6713419.

Examiner took Official notice in the 12/22/2008 Office action – at least for claims 14, 16-17, 19 and 22. The common knowledge or well-known in the art statements are taken to be admitted prior art because applicant failed to traverse any of the assertions of official notice.

From **MPEP 2144.03**

If applicant does not traverse the examiner's assertion of official notice or applicant's traverse is not adequate, the examiner should clearly indicate in the next Office action that the common knowledge or well-known in the art statement is taken to be admitted prior art because applicant either failed to traverse the examiner's assertion of official notice or that the traverse was inadequate. If the traverse was inadequate, the examiner should include an explanation as to why it was inadequate.

The art is applied as in the 12/22/2008. Claim 1 now incorporates the limitations of claims 6 and 7 and thus would have been obvious for the reasons previously given. See also the arguments section below.

Claims 8-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kunert WO/01/53222 in view of Onozawa 6713419 as applied to claim 1 above, and further in view of Romer 6817212.

The art is applied as in the 12/22/2008 rejection and above .

Claims 1 , 29 and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kunert WO/01/53222 in view of Geffcken 3193400

The art is applied as in the 12/22/2008 rejection and above .

Claims 1 and 28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kunert WO/01/53222 in view of Brow 5648302

The art is applied as in the 12/22/2008 rejection and above .

Claims 1 and 30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kunert WO/01/53222 in view of Skedgell 4358544

The art is applied as in the 12/22/2008 rejection and above .

Claims 1 and 30-36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kunert WO/01/53222 in view of Dumesnil 3963505

The art is applied as in the 12/22/2008 rejection and above .

### ***Response to Arguments***

Applicant's arguments filed 5/27/2009 have been fully considered but they are not persuasive. The arguments directed to the non-art rejections were persuasive.

As to the assertion that the Office action has failed to determine the level of skill in the art. The level of skill is readily evident from the applied art and the cited case law. There is no requirement the Office set forth the level of the skill when such is clear and

where applicant has not shown (or suggested how) the lack of stating such does (or could possibly) have any effect on the finding of obviousness in the present application.

As to the argument that the Office has presented no line of reasoning as to why one would selectively pick and choose various elements/concepts from the references. This appears to be irrelevant. The Office made no finding that it would have been obvious to "pick and choose". Rather the Office made findings regarding particular elements/concepts and provided rationale which support those finding. For example: on page 5 of the 12/22/2008 Office action found it would have been obvious to use the superior Onozawa glass as the Kunert lanthanum glasses for any or all of the disclosed advantages in Onozawa. Thus the rejections are based upon more than merely picking and choosing.

In response to applicant's argument that the examiner's conclusion of obviousness is based upon improper hindsight reasoning, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). Examiner finds nothing in applicant's arguments which tends to suggest that the rejection is based on improper hindsight reasoning.

As to the argument that to making the spacing between tubes as large or as small as needed is not obvious, because Kunert does not disclose that the drawings are

to scale, and thus arguments based on measurement of a drawing are of little value. This is not persuasive, because the rejection is not based on any measurement. Rather the rejection is based on Kunert's drawing showing a spacing between the tubes. Applicant's argument appears to be that because Kunert gives no indication as to what the spacing would be, it could be zero. Examiner disagrees because a spacing of zero is not a spacing. It is clear from col. 1, lines 12-13 that Kunert contemplates a non-zero spacing – slits – between pipes.

The assertion that *In re Meng* is analogous to the present situation does not seem correct. Applicant states that in *In re Meng* the references were "void of any written content to the claimed invention, and the only alleged disclosure of the claimed limitation" was found in a drawing. Kunert is not void of any written content - col. 1, lines 12-13 clearly teaches to have slits/spacing.

As to the argument that the spacing would not have been obvious when viewing the Kunert figures. This is not very relevant since such a finding was not made. Rather it would have been obvious to have whatever size is necessary depending upon the size of the apparatus.

As to the assertion that the spacing of the tubes is not dependent upon the crucible's dimension: There is nothing in the specification that reasonably suggests the spacing is independent of crucible dimensions. Applicant appears to be suggesting just because viscosity is disclosed as affecting the spacing, it is the only relevant variable. Examiner finds this not convincing. On the contrary, Applicant's arguments appear to contradict this assertion. That is on page 12 of the arguments applicant admits "this

layer will be unable to withstand the weight of the melt.” An engineer would understand that since one is concerned about the weight of the melt, the height of the crucible matters. That is, if the height is doubled, the molten glass pressure at the base of the crucible doubles, and thus the crucible thickness would need to be increased.

Moreover, the 2-4 mm does not seem that critical. Applicant admits on page 12, lines 14-15 that values less than 5 mm can be used for high-viscosity melts. Page 13, lines 1-5 of the specification indicates that 2-4 mm is advantageous. One would read this as indicating that at the time of the invention applicant viewed the 2-4 mm limitation as not being critical.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.



Any inquiry concerning this communication or earlier communications from the examiner should be directed to John Hoffmann whose telephone number is (571) 272 1191. The examiner can normally be reached on Monday through Friday, 7:00- 3:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Steve Griffin can be reached on 571-272-1189. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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Primary Examiner  
Art Unit 1791

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